IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
	:	
v.	:	CRIMINAL NO. 04-CR-535
	:	
FRED HUMPHRIES	:	

MEMORANDUM

Padova, J. **November 29, 2004**

Defendant Fred Humphries is charged with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Before the Court is Defendant's "Motion to Suppress Physical Evidence and Statements" (Doc. No. 21). For the reasons that follow, the Court denies Defendant's Motion in its entirety.

I. BACKGROUND

Defendant has asked the Court to suppress physical evidence and statements relating to a firearm recovered by police from his car at the time of his arrest. The eyewitness testimony and police records entered into evidence during the November 1, 2004 hearing on Defendant's Motion to Suppress (the "Suppression Hearing") differ in important respects regarding the circumstances of Defendant's arrest. The following facts, however, are uncontroverted. At approximately 9:00 pm on February 6, 2004, Defendant was involved in a two-car automobile accident at the intersection of West 11th Street and Olney Avenue in Philadelphia, Pennsylvania. When Philadelphia Police Officers Ernest Fletcher and David French arrived at the intersection, they observed

Defendant backing his red Nissan Pathfinder away from the scene of the accident. Officers Fletcher and French concluded that Defendant was attempting to leave the scene. The Officers pursued Defendant as he was backing up on the wrong side of the street and signaled for him to stop.

The Police Officers' testimony concerning Defendant's reaction to the pursuit are inconsistent. Officer Fletcher testified during the Suppression Hearing that Defendant did not react to the patrol car's lights and sirens and stopped only when another car blocked his way. (11/1/04 N.T. at 8.) Officer Fletcher recalled that Defendant jumped out of the car and attempted to flee on foot by heading towards an alley way. (Id. at 9-10.) Officer French, however, testified at the Suppression Hearing that the Officers approached Defendant's vehicle when it voluntarily came to a stop and asked Defendant to step out of the car. (Id. at 49.)

Both Officers testified at the Suppression Hearing that they smelled an odor of alcohol on Defendant when they approached him and noted that his eyes were glassy. (Id. at 11, 49-50.) Officer Fletcher testified at the Suppression Hearing that the smell of alcohol on Defendant was strong. (Id. at 12.) Officer French, however, testified that, while he detected an odor of alcohol on Defendant's breath, the odor was not strong. (Id. at 53.) Similarly, the Philadelphia Police Department Arrest Report (the "PARS Report"), which was completed on February 8, 2004, two days

after the arrest occurred, states that the odor of alcohol on Defendant was mild. (See PARS Report, Def's Ex. 1.) In addition, both Officers testified at the Suppression Hearing that Defendant's speech was rapid (11/01/04 N.T. at 11, 51), though Officer French noted that "basically ... he was just talking." (11/01/04 N.T. at 51). Based on Defendant's rapid speech, his glassy eyes and his odor of alcohol, the Officers placed Defendant under arrest for Driving Under the Influence ("DUI"). (Id. at 25, 53.)

A Philadelphia Police Department Investigation Report (the "Investigation Report") was prepared on the night of the incident by an investigating detective who interviewed Officer French. (See Investigation Report, Def's Ex. 4.) According to the Investigation Report, Officer French conducted an NCIC/PCIC check which revealed that Defendant had a suspended driver's license. (See id.) The Officers proceeded to "live stop" Defendant's vehicle.[1] (See id.) The Investigation Report states that Officer French then conducted

[1]The Pennsylvania Vehicle Code, 75 Pa. Cons. Stat. Ann. § 6309.2, provides that: "If a person operates a motor vehicle . . . on a highway or trafficway of this Commonwealth while the person's operating privilege is suspended . . . as verified by an appropriate law enforcement officer . . . the law enforcement officer shall immobilize the vehicle, and the vehicle." 75 Pa. Cons. Stat. Ann. § 6309.2(a)(1). The Philadelphia Police Department enforces § 6309.2 through its "Live Stop" program. (See Philadelphia Police Department Memorandum (02-4) Subject: "Live Stop" Program (July 1, 2002), Govt's Ex. 2 (hereafter "Memorandum (02-4)."). Pursuant to the "Live Stop" program, once a Police Officer learns that a vehicle must be immobilized in accordance with § 6309.2, the vehicle is impounded and an inventory search is conducted. (See Memorandum (02-4) at 3.)

an inventory search of Defendant's car, in the course of which he recovered a black semi automatic Beretta handgun. (See id.) The PARS Report also states that a license check was conducted after Defendant was arrested for DUI, and that his vehicle was searched only after the driver's license check revealed that Defendant had a suspended license. (See PARS Report.)

At a Preliminary Hearing held on March 29, 2004, in the Philadelphia County Municipal Court (the "Preliminary Hearing"), Officer French testified that he returned to the scene of the accident after Defendant was arrested for DUI. (03/29/04 N.T. at 7.) Officer French also testified that, while he was away, Officer Fletcher discovered that Defendant's drivers license was suspended and proceeded to conduct an inventory search pursuant to the live-stop procedure. (Id.)

Officer Fletcher, however, testified differently about these events during the Preliminary Hearing. According to Officer Fletcher's testimony, he saw and recovered the handgun after Defendant had exited the vehicle but before the license check was performed. (03/29/04 N.T. at 12.) Officer Fletcher also testified that Defendant's vehicle was searched incident to his arrest for DUI. (Id.) This version of events is supported by the Philadelphia Police Department Vehicle or Pedestrian Investigation Report (the "V.P.I. Report"), which was completed by Officers French and Fletcher on the night of the incident, and by Officer

Fletcher's testimony at the Suppression Hearing. (See V.P.I Report, Def's Ex. 5; 11/01/04 N.T. at 12).

The evidence of record is also inconsistent regarding the location of the gun in the vehicle when it was recovered. The Philadelphia Police Department Complaint or Incident Report (the "Incident Report"), prepared by Officers Fletcher and French on the day of the accident, states that the gun was recovered from under the front driver's seat of Defendant's vehicle. (See Incident Report, Def's Ex. 3.) The V.P.I. and PARS Reports similarly state that a black gun was found under the driver's seat during a search incident to the arrest of Defendant for DUI. (See V.P.I Report; PARS Report.)

At the Preliminary Hearing, however, Officer Fletcher testified that he saw the handgun because it was resting in plain view on the floor behind the driver's seat. (03/29/04 N.T. at 14.) At the Suppression Hearing, Officer Fletcher again testified that, before running a license check, he looked inside Defendant's vehicle and saw a black handgun on the floor of the back seat area of the car, entirely unobstructed by the driver's seat. (Id. at 12-15.) After finding the handgun, Officer Fletcher then handcuffed Defendant and conducted a driver's license check. (Id. at 15.) This check revealed that Defendant's driver's license was suspended and that he did not have a license to carry a firearm. (Id.) It was only then that Defendant' vehicle was "live stopped."

(Id.)

II. LEGAL STANDARD

Defendant has moved to suppress all physical evidence and statements regarding the recovery of the gun from his vehicle on the grounds that the search of his vehicle was conducted without a warrant and no exceptions to the warrant requirement of the Fourth Amendment apply in this case. Under the Fourth Amendment, the government must obtain a warrant prior to searching areas in which an individual possesses a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 360 (1967); United States v. Herrold, 962 F.2d 1131, 1136-37 (3d Cir. 1992). Automobiles are within the reach of the Fourth Amendment warrant requirement even though warrantless searches of vehicles are have been upheld in situations in which the search of a home or office would not have been proper. South Dakota v. Opperman, 428 U.S. 364, 367 (1976).

Evidence obtained during a warrantless search is only admissible at trial if the search and seizure was permissible under an exception to the Fourth Amendment's warrant requirement. Minnesota v. Dickerson, 508 U.S. 366, 372 (1993); Herrold, 962 F.2d at 1137. Otherwise, a defendant may seek the suppression of the illegally obtained evidence through the application of the exclusionary rule. United States v. Calandra, 414 U.S. 338, 347 (1974); Herrold, 962 F.2d at 1137.

On a motion to suppress, the burden of proof is initially on

the defendant who seeks suppression of the evidence. United States v. Johnson, 63 F.3d 242, 245 (3d Cir. 1995). Once the defendant has established a basis for his motion, in this case a warrantless search, the burden shifts to the government to establish by a preponderance of the evidence that the evidence sought to be suppressed is admissible. Id. The government can do so by proving that the search and seizure was reasonable under an exception to the warrant requirement of the Fourth Amendment. Id.

III. DISCUSSION

A. Search Incident to Lawful Arrest

The Government argues that evidence relative to the recovery of the gun from Defendant's vehicle is admissible because the gun was obtained during a search incident to lawful arrest. When police officers make a valid custodial arrest of occupants of a vehicle, they may conduct a contemporaneous search of the passenger compartment of the vehicle. New York v. Belton, 453 U.S. 454, 460 (1981). The validity of a search incident to arrest, however, depends on the validity of the arrest itself. Beck v. Ohio, 379 U.S. 89, 91 (1964); United States v. Rickus, 351 F.Supp. 1379, 1381 (E.D. Pa. 1972).

> Whether that arrest was constitutionally valid depends in turn on whether, at the moment the arrest was made, the Officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant]

had committed or was committing an offense.

Beck, 379 U.S. at 91. An arrest without probable cause is unconstitutional under the Fourth Amendment. Berg v. County of Allegheny, 219 F.3d 261, 269 (3d Cir. 2000). While the officers' belief at the moment of the arrest need not be correct, it must be reasonable. Texas v. Brown, 460 U.S. 730, 742 (1983). The validity of the arrest is determined by the law of the state where the arrest occurred. Ker v. California, 374 U.S. 23, 38 (1963); U.S. v. Myers, 308 F.3d 251, 255 (3d Cir. 2000).

The Government argues that Officers Fletcher and French had probable cause to arrest Defendant for DUI at the time the arrest was made. The evidence of record establishes that Officers French and Fletcher based their decision to arrest Defendant on his odor of alcohol, glossy eyes, and rapid speech. (11/01/04 N.T. at 11, 49-59). At the Suppression Hearing, both Officers further testified that Defendant did not stagger or sway, did not drive erratically when followed by the police cruiser, and did not exhibit any other signs of alcohol consumption. (Id. at 19, 24, 51-53.)

The evidence before the Court is equivocal and unreliable with respect to the smell of alcohol. Defendant had only a moderate smell of alcohol about him, was not administered field-sobriety tests prior to being placed under arrest, did not have bloodshot eyes, and was not observed to be driving erratically - even while

backing up. Furthermore, Defendant was involved in a two-car accident, and the record is devoid of any indication that Defendant caused the accident. These facts are insufficient to establish by a preponderance of the evidence, that, at the time of the arrest, the Officers had probable cause to believe that Defendant was driving under the influence. See Commonwealth v. Guerry, 364 A.2d 700, 702 (Pa. 1976) (determining that probable cause existed where defendant was involved in one-car accident and has strong odor of alcohol on his breath as well as glassy and bloodshot eyes); Commonwealth v. Klingensmith, 650 A.2d 444, 446 (Pa. Super. Ct. 1994) (determining that probable cause existed where the defendant had bloodshot eyes, smelled of alcohol, and failed to pass field sobriety tests); Commonwealth v. Kohl, 576 A.2d 1049, 1053 (Pa. Super. Ct. 1990) (determining that no probable cause existed based on one-car accident when unconscious defendant does not smell of alcohol); Commonwealth v. Hamme, 583 A.2d 1245, 1247 (Pa. Super. Ct. 1990) (determining that probable cause existed where defendant was observed driving erratically, had an odor of alcohol on his breath, and failed field sobriety tests); Commonwealth v. Smith, 555 A.2d 185, 189 (Pa. Super. Ct. 1989) (determining that probable cause existed where defendant smells of alcohol, has bloodshot and glassy eyes, and caused a serious one-car accident).

Accordingly, the Government has not met its burden of showing by a preponderance of the evidence that the Officers had probable

cause to arrest Defendant for DUI. As the arrest itself was unlawful, any search incident to arrest was equally unlawful, and the search incident to arrest exception to the warrant requirement of the Fourth Amendment does not apply. See Beck, 379 U.S. at 91 (1964). Therefore, evidence regarding the recovery of the gun is not admissible at trial as having been obtained pursuant to a search incident to a lawful arrest and may be admitted only if it falls under one of the other exceptions to the warrant requirement.

B. Plain View Exception

The Government also argues that evidence relating to the recovery of the gun is admissible under the plain view exception to the warrant requirement under the Fourth Amendment. Under the plain view exception, evidence that is inadvertently discovered by police officers may, under certain circumstances, be seized without a warrant. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). Evidence seized lying in plain view will not be suppressed provided that: (1) the officers did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed, (2) the incriminating character of the evidence is immediately apparent, and (3) the officers have a lawful right to access the object seized. Horton v. California, 496 U.S. 128, 136-37 (1971).

Officer Fletcher testified during the Preliminary Hearing that the gun had slid out from underneath the driver's seat and "was

more on the floor in the back," plainly visible when he looked inside the vehicle through the window. (03/29/04 N.T. at 14.) Similarly, during the Suppression Hearing, Officer Fletcher testified that the gun was on the floor of the back seat area of the car, entirely unobstructed by the driver's seat. (11/01/04 N.T. at 14.)

This account of events is inconsistent with the police reports filed immediately after the incident. The Investigation Report states that it was Officer French who recovered the gun from Defendant's vehicle. (See Investigation Report.) Moreover, the Incident Report, V.P.I. Report, and PARS Report all state that the gun was recovered from under the front driver's seat. (See Incident Report; V.I.P Report; PARS Report.)

The Court finds, therefore, that the Government has not established by a preponderance of the evidence that the gun was discovered in plain view. The Court further finds that the plain view exception is not applicable to this case, see Horton v. California, 496 U.S. at 37, and that evidence relating to the recovery of the gun is not admissible under the plain view exception to the warrant requirement of the Fourth Amendment.

C. Investigatory Stop and Search

The Government additionally argues that evidence regarding the recovery of the gun is admissible because the gun was validly discovered during a search following an investigatory stop. Under

the Fourth Amendment, investigatory stops are permissible if they are based on reasonable suspicion. Terry v. Ohio, 392 U.S. 1, 9 (1968). Warrantless searches of cars, however, are valid only if based on probable cause. Ornelas v. United States, 517 U.S. 690, 693 (1996) (citing California v. Acevedo, 500 U.S. 565, 569-70 (1991)). Reasonable suspicion for an investigatory stop is defined as "'a particularized and objective basis' for suspecting the person stopped of criminal activity." Ornelas, 517 U.S. at 696 (citing United States v. Cortez, 449 U.S. 411, 417-18 (1981)). Probable cause for the warrantless search of a car incident to an investigatory stop, on the other hand, exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." Ornelas, 517 U.S. at 696 (citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949)).

In this case, it is undisputed that the Officers had reasonable suspicion to stop Defendant for attempting to flee the scene of an accident. However, there is no evidence to support a finding that the Officers had probable cause to believe that in searching Defendant' car, they would uncover contraband or evidence of a crime. See Ornelas, 517 U.S. at 696. Accordingly, the Court finds that evidence related to the recovery of the gun is not admissible under the investigatory stop and search exception to the warrant requirement of the Fourth Amendment.

D. Inevitable Discovery Doctrine

The Government further argues that evidence related to the recovery of the gun is admissible under the inevitable discovery doctrine. Under the inevitable discovery doctrine, illegally obtained evidence may be admitted at trial if the government establishes by a preponderance of the evidence that the evidence in question would have ultimately been discovered by lawful means. Nix v. Williams, 467 U.S. 431, 444 (1984); see also United States v. Vasquez De Reyes, 149 F.3d 192, 195 (3d Cir. 1998); United States v. Atkins, Crim. No. 99-633, 2000 WL 781439, at *4 (E.D. Pa. June 5, 2000). The government can establish inevitable discovery by showing that the evidence would ultimately have been recovered by the police pursuant to routine police procedures. Atkins, 2000 WL 781439, at *4 (citing De Reyes, 149 F.3d at 195).

The Government argues that the gun would have inevitably been discovered in a routine inventory search of Defendant's legitimately seized vehicle. "It is well established that law enforcement officers may make a warrantless inventory search of a legitimately seized vehicle." United States v. Bush, 647 F.2d 357, 370 (3d Cir. 1981). Inventory searches serve three distinct purposes: "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen or vandalized property, and to guard the police from danger." Florida v. Wells, 495 U.S. 1, 4 (1990) (citing Colorado v. Bertine, 479

U.S. 367, 372 (1987)). Police officers may engage in warrantless inventory searches provided that "standardized criteria or an established routine . . . limit an officer's discretion in two ways. First, it must limit the officer's discretion regarding *whether* to search a seized vehicle. Second, the pre-existing criteria or routine must limit an officer's discretion regarding the *scope* of an inventory search." United States v. Salmon, 944 F.2d 1106, 1120 (3d Cir. 1991) (collecting cases) (internal citations omitted) (emphasis in original).

The record before the Court establishes that the Philadelphia Police Department had a pre-existing policy that an inventory search can be conducted on all vehicles seized from persons driving with suspended licenses. (See Memorandum (02-4).) The Government contends that the gun would have been inevitably discovered under the established search criteria of the Philadelphia "Live Stop" program once it was determined that the Defendant was driving without a valid driver's license.

Officer Fletcher's uncontradicted testimony establishes that if a person is found to be driving without a valid operator's license, the police are permitted to "live stop" the vehicle. (11/01/04 N.T. at 15.) Memorandum (02-4), which describes the Philadelphia "Live Stop" program, states that "any vehicle may be impounded when it is determined, during a lawful vehicle investigation that the operator is in violation of . . . §1501(a)

– Drivers Required to be Licensed." (Memorandum (02-4) at 1.)

As part of the "live stop" procedure, the police seize the vehicle in question and impound it until documentation is presented that establishes the owner's compliance with the rules and regulations pursuant to which the vehicle was seized. (11/01/04 N.T. at 15.) According to Officer Fletcher, "the procedures for 'live stop' on the vehicle is [sic] to thoroughly search the vehicle for weapons." (Id.) Memorandum (02-4) specifies that, once a tow truck arrives on location, the investigating officer shall conduct a vehicle inventory. (Memorandum (02-4) at 3.)

The scope of an inventory search pursuant to the "Live Stop" program is limited to the discovery of "any damage and/or missing equipment, personal property of value left in the vehicle by the operator/occupants including the trunk area if accessible." (Id.) While "[n]o locked areas, including the trunk area, will be forced open while conducting an inventory," (id.) an inventory search is broad enough to permit a "thorough[] search [of] the vehicle for weapons." (11/01/04 N.T. at 15.)

Officer Fletcher testified that, after he had recovered the gun, performed a license check, and determined that Defendant's license had been suspended, he conducted a thorough search of the vehicle in accordance with the "live stop" procedure. (Id. at 16.) Under the Philadelphia "live stop" procedure, Officer Fletcher had no discretion to decide whether to search Defendant's vehicle once

he determined that it had to be impounded. See Salmon, 944 F.2d at 1120. Moreover, under the scope of inventory searches established by Memorandum 02-4, investigating officers are permitted to look under the driver's seat of the vehicle. (See Memorandum (02-4).) Given Officer Fletcher's uncontroverted testimony that he was acting in accordance with standard police practice and the Memorandum (02-4) guidelines for inventory searches, this Court is satisfied that he had no discretion regarding the scope of the search. See Salmon, 944 F.2d at 1120.

Accordingly, the Court finds that if Officer Fletcher had not discovered the gun prior to the inventory search, he would have inevitably discovered it when he conducted a valid inventory search of Defendant's vehicle under the Philadelphia "live stop" procedure. The Court, therefore, finds that all evidence regarding the discovery of the gun is admissible at trial pursuant to the inevitable discovery exception to the warrant requirement under the Fourth Amendment. For these reasons Defendant's Motion to Suppress is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
	:	
v.	:	CRIMINAL No. 04-CR-535
	:	
FRED HUMPHRIES	:	

ORDER

AND NOW, this 29th day of November, 2004, upon consideration of Defendant's Motion to Suppress all Physical Evidence and Statements (Doc. No. 21), all attendant and responsive briefing, and the Hearing on the Motion to Suppress held on November 1, 2004, **IT IS HEREBY ORDERED** that Defendant's Motion to Suppress Physical Evidence and Statements (Doc. No. 21) is **DENIED.**

BY THE COURT:

/s/ John R. Padova

JOHN R. PADOVA, J.